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CPLR 302(a)(3): Recent Developments

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jurisdiction, since the presence of representatives would evidence an intent to perform purposeful acts in New York.[9] Seemingly, the Court in *McKee* has qualified this proposition so that where the visits of the representative are few and the primary purpose is to participate in general discussions that fail to accomplish substantial results, there is no purposeful activity in New York sufficient to constitute a transaction of business.

To construe CPLR 302(a)(1) otherwise would, as observed by the Court of Appeals, create a risk of in personam jurisdiction as to any corporation "whose officers or sales personnel happen to pass the time of day with a New York customer in New York. . . ." [10]

CPLR 302(a)(3): Recent Developments.

Under New York's amended long-arm statute, personal jurisdiction may be exercised over non-domiciliaries who commit tortious acts without the state causing injury within the state if certain criteria are met.[11] The original tort provision of the CPLR, 302(a)(2), still found in the statute, allowed for personal jurisdiction to be exercised over non-domiciliaries who committed tortious acts within the state.[12]

While the Supreme Court of Illinois had interpreted its long-arm statute—similar to and a model for the New York act—to include a tortious act originating outside the state culminating in injury within the state to be a tortious act committed within the state,[13] the New York Court of Appeals, in *Feathers v. McLucas*,[14] gave a strict and literal interpretation to CPLR 302(a)(2), stating that the language of the statute was "too plain and precise" to

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[9] *See* 7B McKINNEY's CPLR 302, supp. commentary 81 (1966).

[10] 20 N.Y.2d at 382, 229 N.E.2d at 607, 283 N.Y.S.2d at 37.

[11] That is, the defendant must:

(1) regularly do or solicit business in New York, *or*

(2) engage in a persistent course of conduct within the state, or derive substantial revenue from goods used or consumed or services rendered in New York. CPLR 302(a)(3)(i). Or the defendant must:

(1) expect or should reasonably expect the act to have consequences in New York, *and*

(2) derive substantial revenue from interstate or international commerce. CPLR 302(a)(3)(ii).

[12] CPLR 302(a)(2).

[13] Gray v. American Radiator & Standard Sanitary Corp., 23 Ill. 2d 432, 176 N.E.2d 761 (1961). The Ohio manufacturer of a defective valve which caused injury in Illinois was held to be within the "tortious act" provision of Illinois' long-arm statute since there could be no distinction between the negligent act of manufacturing and the injury caused thereby.

[14] 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). *See generally The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 134 (1965).

permit it to include a tortious act committed without the state which caused injury within the state.[15]

As a result of the Court of Appeals' decision, New York's long-arm statute would not reach a non-resident who, by a tortious act without the State, caused injury within the State.[16] Expanding the jurisdictional scope of the New York courts to include the extraterritorial tortious acts of non-residents became, as suggested in *Feathers*,[17] a matter for the legislature rather than the judiciary. An amendment proposed by the Judicial Conference[18] was adopted by the Legislature and became effective September 1, 1966.[19] The amendment permits a court to exercise personal jurisdiction over a non-domiciliary whose tortious act without the state causes injury within the state if, first, he regularly engages in business or other course of conduct or derives substantial revenue from New York or, second, he can foresee his act having consequences in New York and he derives substantial revenue from interstate or international commerce.[20]

Recently, two cases of first impression were brought challenging service made under authority of 302(a)(3). In *Brown v. Erie Lackawanna R.R.*,[21] a non-resident defendant's freight car was leased to the co-defendant, a New York railroad. Plaintiff's intestate was killed when the box car went out of control and hit the car which he was driving. The court sustained jurisdiction on the basis of CPLR 302(a)(3)(ii).[22] Defendant's usual practice of leasing its rolling stock for use in various states by other railroads was found by the court a sufficient basis to maintain jurisdiction since the defendant derived substantial revenue from interstate commerce even though there was an absence of any proof as to amount. Moreover, the test to determine whether a defendant expects or reasonably can expect an act to

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[15] 15 N.Y.2d at 460, 463, 209 N.E.2d at 77, 79, 261 N.Y.S.2d at 21, 23.

[16] Reese, *A Study of CPLR in Light of Recent Judicial Decisions*, N.Y. JUDICIAL CONFERENCE, ELEVENTH ANNUAL REPORT 132 (1965). *See also The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 463, 471 (1967).

[17] 15 N.Y.2d at 464, 209 N.E.2d at 80, 261 N.Y.S.2d at 24.

[18] *Judicial Conference Report on the Civil Practice Law and Rules*, 2 MCKINNEY'S SESSION LAWS 2780, 2786-87 (1966) (hereinafter cited as *Judicial Conference Report*).

[19] N.Y. Sess. Laws 1966, ch. 590. For a discussion of the amendment and its background, see generally *The Quarterly Survey of New York Practice*, *supra* note 16.

[20] CPLR 302(a)(3).

[21] 54 Misc. 2d 225, 282 N.Y.S.2d 335 (Sup. Ct. Oneida County 1967).

[22] The court noted that while 302(a)(3)(i) could be a basis for jurisdiction due to the solicitation of shippers and occasional financing through banks in New York, 302(a)(3)(ii) provided a sound basis for jurisdiction. *Id.* at 227, 282 N.Y.S.2d at 337.

have consequences in New York was interpreted by the court to be an objective rather than a subjective one.[23]

Rejecting defendant's contention that plaintiff must *prove* a tortious act committed outside New York, the court ruled that it is only necessary to *plead* a tortious act under 302(a)(3)(ii) for jurisdictional purposes. Further, questions of ultimate liability were deemed properly determinable in disclosure proceedings or at trial. The plaintiff was not required to show at the outset the tortious act was committed *outside* the state. The fact that it may have consequences in New York will not alter its "personal localization" as a tortious act outside the state, since *Feathers* clearly demonstrated that the act and injury can be separate.

In the second case *Gillmore v. J. S. Inskip, Inc.*,[24] plaintiff brought an action for negligence and breach of warranty against a Pennsylvania importer of an automobile, its English manufacturer, and a New York dealer. The first two defendants moved to dismiss for lack of jurisdiction, but the Supreme Court, Nassau County, denied the motion on the basis of CPLR 302(a)(3)(i). Although the defendants had established in their moving papers that they did not come within the "doing business" or "course of conduct" provisions of 302(a)(3)(i), the court decided that they had failed to show that they did not come within the "substantial revenue" provisions of 302(a)(3)(i) and (ii), *i.e.*, they failed to show the absence of substantial revenue from New York, or from interstate or international commerce. "Substantial revenue," the court stated, was to be determined by a comparison of the defendants' New York interstate or international gross sales revenue or net profits with the defendants' total gross sales revenue or total net profits. The defendants here had not specified any of these figures in their motion papers.[25]

The *Gillmore* case establishes a tentative guideline to assist New York courts in determining whether the substantial revenue requirements of 302(a)(3) have been met.[26] Also, the case serves

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[23] 54 Misc. 2d at 227, 282 N.Y.S.2d at 337. "If these standards [of foreseeability] have any relevance they also indicate that the phrase 'reasonably expects' should be given an objective rather than a subjective meaning." *See* Homburger & Laufer, *Expanding Jurisdiction over Foreign Torts: The 1966 Amendment of New York's Long-Arm Statute*, 16 BUFFALO L. REV. 67, 74 (1966).

[24] 54 Misc. 2d 218, 282 N.Y.S.2d 127 (Sup. Ct. Nassau County 1967).

[25] *Id.* at 220-22, 282 N.Y.S.2d at 131-33. The denial of the motion, however, was without prejudice to defendant's right to reassert the jurisdictional defense in their answer upon a showing that substantial revenue was not derived within the meaning of the statute. 54 Misc. 2d at 222, 282 N.Y.S.2d at 133.

[26] Substantial revenue is not defined in the *Judicial Conference Report*, *supra* note 18, or in the UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 1.03(4). There are, however, some indications of how substantial revenue might be defined. One authority, interpreting 302(a)(3)(i), felt it would connote a course of earning in New York. 7B MCKINNEY'S

as a guide to attorneys with respect to what facts and figures should be alleged by them in drafting motions under 302(a)(3).

However, the most significant aspect of the *Gillmore* case is its treatment of the constitutionality of 302(a)(3). Jurisdiction over the defendants under 302 (a)(3)(i) was, in the court's view, clearly constitutional on the basis of *Gray v. American Radiator & Standard Sanitary Corp.*[27] The court reasoned that the "substantial revenue" provision in the CPLR 302(a)(3)(i) is predicated on the concept that one who has derived "substantial revenue" from the use or consumption of goods or services has sufficient contact with New York to be subject to jurisdiction based on a tortious act committed without the state causing injury within the state.[28]

Since jurisdiction over the defendants could be sustained under 302(a)(3)(i), the court was relieved of the difficult task of deciding the constitutionality of 302(a)(3)(ii). It noted, however, that the basis of (ii) was that, irrespective of any revenue derived from New York, a non-domiciliary who derives substantial revenue from interstate or international commerce has sufficient contact with the state if he expects or reasonably should expect his tortious act outside the state to have consequences within the state. Despite the conclusion of the Judicial Conference [29] that one who met the requirements of 302(a)(3)(ii) could fairly be considered able to handle litigation away from his business location, on the facts of a particular case this might not be a sufficient due process basis for jurisdiction [30] because of the "minimum contacts" requirement established by *International Shoe Co. v. Washington* [31] and reaffirmed in *Hanson v. Denckla.*[32]

While traditionally the basis for personal jurisdiction was physical presence,[33] the Supreme Court liberalized this test in *International Shoe Co. v. Washington.*[34] Due process was there held to require that to subject a non-resident defendant to an

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CPLR 302, supp. commentary 84 (1966). *See also* Kramer v. Vogl, 17 N.Y.2d 27, 32, 215 N.E.2d-159, 161, 267 N.Y.S.2d 900, 904 (1966), where the Court compared the foreign corporation's total sales with its sales to the plaintiff in New York in determining whether or not the foreign corporation transacted business in New York. *See also* Johnson v. Equitable Life Assur. Soc'y, 22 App. Div. 2d 138, 140, 254 N.Y.S.2d 258, 260-61 (1st Dep't 1964), *remanded for further development of record*, 16 N.Y.2d 1067, 213 N.E.2d 466, 266 N.Y.S.2d 138 (1965).

[27] 23 Ill. 2d 432, 176 N.E.2d 761 (1961).

[28] *See Judicial Conference Report, supra* note 18, at 2788-89.

[29] *Id.* at 2788.

[30] 54 Misc. 2d at 224, 282 N.Y.S.2d at 135. *See Judicial Conference Report, supra* note 18, at 2788-89; 7B McKINNEY'S CPLR 302, supp. commentary 85-86 (1966); *The Quarterly Survey of New York Practice, supra* note 16.

[31] 326 U.S. 310 (1945).

[32] 357 U.S. 235 (1958).

[33] Pennoyer v. Neff, 95 U.S. 714 (1878).

[34] 326 U.S. 310 (1945).

in personam judgment, he must have "certain minimum contacts with [the state] . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and justice.' " [35] In the later case of *Hanson v. Denckla*,[36] the Supreme Court observed that due process required that there be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[37] It is within the basic constitutional framework established by *International Shoe* and *Hanson* that 302(a)(3)(i) and (ii) must be discussed.

CPLR 302(a)(3)(i)

CPLR 302(a)(3)(i) rests upon a much stronger constitutional basis than does (ii). It is a verbatim incorporation of the text of Section 1.03(a)(4) of the Uniform Interstate and International Procedure Act and is more restrictive than the Illinois statute interpreted as constitutional in *Gray*.[38] In addition, a federal court has recently held constitutional a Virginia products-liability provision of a long-arm statute whose requirements were similar to 302(a)(3)(i).[39] CPLR 302(a)(3)(i) is also in accord with other long-arm statutes that have been held constitutional by state courts where jurisdiction was sought on the basis of a single tort.[40] The contacts described in 302(a)(3)(i) were de-

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[35] *Id.* at 316.

[36] 357 U.S. 235 (1958).

[37] *Id.* at 253.

[38] *See* 9B UNIFORM LAWS ANNOTATED § 1.03, Commissioners' Note 312 (1966). In *Gray*, with apparently no proof on the matter, the court assumed that the defendant had received the benefits of substantial sales in Illinois. 1 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 302.10 (1966).

[39] Jackson v. National Linen Serv. Corp., 248 F. Supp. 962 (W.D. Va. 1965). The applicable provisions of VA. CODE ANN. § 8-81.2 (Supp. 1966) were: "(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the persons . . . (5) Causing injury in this State to any person by breach of warranty expressly or impliedly made in the sale of goods outside this State when he might have reasonably expected such person to use, consume, or be affected by the goods in this State, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State."

Although 302(a)(3)(i) has no foreseeability requirement, one might be implied particularly in light of the framers' intent that the amendment not be so broad as to unreasonably burden non-residents who could not be expected to foresee that their acts outside New York would have harmful consequences in New York. *See Judicial Conference Report, supra* note 18, at 2788.

[40] Note, *CPLR—Personal Jurisdiction Over Non-Domiciliaries Who Commit Tortious Acts Outside New York*, 33 BROOKLYN L. REV. 107, 110

signed to assure the constitutionality of the provision [41] and they would seem to be sufficient "minimum contacts" with New York within the meaning of *International Shoe* and *Hanson* since they are direct and the defendant invokes the benefits and protections of the laws of New York. In addition, since by these contacts the non-resident defendant can be said to be "purposefully availing" itself of the privilege of conducting activities in New York, only an extremely strict interpretation of *Hanson* would prevent this section from being constitutional.

CPLR 302(a)(3)(ii)

Under 302(a)(3)(ii), two elements must be present to make a non-resident subject to personal jurisdiction: foreseeability of forum consequences and derivation of substantial revenue from interstate or international commerce. The Judicial Conference Report upon which the amendment was based seems to justify 302(a)(3)(ii) largely on the fact that it seems fair and desirable that a defendant who could foresee consequences in New York and who derives substantial revenue from interstate and international commerce be required to handle litigation away from his business location.[42]

Those who advocate the constitutionality of 302(a)(3)(ii) rely on a liberal interpretation of the *Hanson* case and feel that, in light of developments in the field of products liability,[43] it is not unfair to require a non-resident manufacturer who knowingly sends his product into another state to appear and defend in the state where his product has caused injury.[44] From their viewpoint, 302(a)(3)(ii) is a welcome step away from the lingering doctrine of presence and should, therefore, be held constitutionally valid.

The difficulty with (ii) seems to be that the legislature, in its haste to correct the situation brought about by the *Feathers* case, has set a statutory standard that may not meet the "minimum contacts" requirements of *International Shoe* and *Hanson* in certain situations. A non-domiciliary might derive substantial revenue from interstate or international commerce and yet have no "contact" with New York since no part of the revenue need come

(1966). *See, e.g.*, Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1954); Painter v. Home Finance Co., 245 N.C. 576, 96 S.E.2d 731 (1957).

[41] *See* Homburger & Laufer, *supra* note 23, at 71; Note, *supra* note 40.

[42] *Judicial Conference Report, supra* note 18, at 2788.

[43] *See, e.g.*, Jackson v. National Linen Serv. Corp., 248 F. Supp. 962 (W.D. Va. 1965).

[44] Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 548-49; Homburger & Laufer, *supra* note 23, at 77-80.

from this state.[45] In such a case, foreseeability of New York consequences is the only element which approaches a "contact" by the defendant with New York. While foreseeability has been regarded as an element or part of jurisdictional basis,[46] it alone will not satisfy due process requirements for in personam jurisdiction,[47] and it was not the intent of the legislature that it should.[48]

For example, *D*, a California surfboard manufacturer who sells his custom-designed boards throughout the Western United States, Peru, France, and South Africa, sells a surfboard to *P*, a New York resident, during an international surfing competition in California in which *P* is an entrant. *P* buys the surfboard while in California because *D* has no distributor in New York. While surfing in New York, *P* is severely injured when the board splits due to a latent structural defect. Since *D* obviously derived most of his income from interstate and international commerce, presumably he could be required, by virtue of CPLR 302(a)(3)(ii), to defend an action brought by *P* in New York if the foreseeability of the forum consequences could be established.

As illustrated above, the difficulty with 302(a)(3)(ii) is that it fails to sufficiently set a standard by which jurisdiction can be determined—standards thus far set by the courts—and it fails to accurately reflect the legislative intent expressed in the Judicial Conference Report. A "one shot" business transaction can be the basis of jurisdiction under 302(a)(3)(ii) provided the in-state consequence was foreseeable and the "substantial revenue" requirement was met. However, the Judicial Conference sought to exclude non-domiciliaries whose activities in interstate commerce were not extensive or whose business operations were primarily of a local character.[49]

Certainly a large scale manufacturer whose product is widely distributed in interstate commerce would meet the Conference's standard; just as certainly, the standard would not be met by a manufacturer whose activities were on a small scale or geographically restricted.[50] As a test to determine whether the substantial revenue requirement of 302(a)(3)(ii) is met, merely comparing interstate or international gross sales revenue with total gross sales revenue as in the *Gillmore* case appears inadequate. For example, in the surfboard hypothetical, the manufacturer may have derived 90 percent of his total revenue from interstate or inter-

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[45] *See* Note, *supra* note 40.

[46] *See* Keckler v. Brookwood Country Club, 248 F. Supp. 645, 648 (N.D. Ill. 1965).

[47] See the example given by the court in Erlanger Mills Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956).

[48] *Judicial Conference Report, supra* note 18, at 2789-90.

[49] *Id.* at 2788-89.

[50] *Id.*

national commerce. It is clear that even though he derived substantial revenue from interstate or international commerce under the *Gillmore* test, he would nevertheless not be "generally equipped to handle litigation away from his business location." [51]

Conclusion

Seemingly, CPLR 302(a)(3) will withstand constitutional objections in principle, if not in all applications, as one authority has noted.[52] Probably most difficulty will arise with respect to 302(a)(3)(ii). However, even that subsection may withstand constitutional attack in a proper case. For example, if suit is brought in New York against a large nation-wide manufacturer whose activities in and revenue derived from New York are not sufficient to meet the requirements of 302(a)(3)(i), but whose revenue is largely derived from interstate and international commerce, an application of 302(a)(3)(ii) would probably be allowed to stand. It is almost certain that if (ii) encounters its first constitutional test in a case presenting facts similar to the surfboard hypothetical, it will fail. If 302(a)(3)(ii) is to withstand all constitutional objections it must either be construed by the courts of New York so as to meet due process requirements or it must be amended by the legislature.

Until there is a Supreme Court decision on the constitutionality of obtaining jurisdiction over a non-resident for tortious acts outside the state causing injury within the state, the constitutional status of 302(a)(3) will remain uncertain.

CPLR 302(a)(3): Situs of injury in unfair competition action is where plaintiff lost business.

Aside from the substantial revenue conundrum of CPLR 302(a)(3) discussed above, there has been a most recent development in another requirement of 302(a)(3) long-arm jurisdiction,

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[51] *Id.* One source has noted that 302(a)(3)(ii) could raise a constitutional question under the commerce clause if it placed an unreasonable burden on interstate commerce. Homburger & Laufer, *Expanding Jurisdiction Over Foreign Torts: The 1966 Amendment of New York's Long Arm Statute*, 16 BUFFALO L. REV. 67, 79 (1966). However, since an activity that would give rise to the cause of action occurred within the state, *i.e.*, the injury, this factor would seem to prevent an undue burden on interstate commerce. Note, *Developments in the Law—State Court Jurisdiction*, 73 HARV. L. REV. 909, 986 (1960). Since the cases on commerce clause limitations of jurisdiction proscribe only oppressive and unreasonable burdens, the public interest favors a correlative duty on one who enjoys large scale access and operations in interstate or international commerce to appear, in certain situations, in the forum of the tort victim to litigate a claim. Homburger & Laufer, *supra* at 79-80.

[52] Homburger & Laufer, *supra* note 51, at 76.